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ALEXANDER L. STEVAS,
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No. 80-2042

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

L. T. BRADT,

Petitioner

v.

THE HONORABLE SHEARN SMITH, ET AL.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that a trial or evidentiary hearing is not required to rule on a Motion to Dismiss filed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure?

2. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that the attorney-client privilege and the work-product immunity are not rights, privileges or immunities secured by the constitution and laws of the United States when they arise in the context of a civil action in a state court?

3. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that petitioner failed to allege a deprivation of his privilege against self-incrimination under the fifth and fourteenth amendments?

LIST OF PARTIES REQUIRED BY RULE 34.1(b)

The following were parties to this case in both the District Court and the Court of Appeals:

Tom Alexander

John B. Bible

John B. Bible & Associates, Inc.

L. T. Bradt

Butler, Binion, Rice, Cook & Knapp

The Honorable Shearn Smith

SUBJECT INDEX

	Page
Questions Restated	i
List of Parties	ii
Index of Authorities	iv
Opinions of the Courts Below	1
Statement of the Case	1
Reasons for Denying the Petition	2
1. Bradt is not entitled to a trial or an evidentiary hearing in a Motion to Dismiss which is filed pursuant to Rule 12(b)(6)	2
2. The attorney-client privilege and the work product immunity are not rights, privileges or immunities secured by the constitution and laws of the United States when they arise in the context of a civil proceeding in a state court	3
3. Bradt failed to allege a deprivation of his privilege against self-incrimination under the fifth and fourteenth amendments	6
Conclusion	9
Certificate of Service	10

INDEX OF AUTHORITIES

CASES

	Page
Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)	4, 8
Beckler v. Superior Court of Los Angeles County, 568 F.2d 661 (9th Cir. 1978)	5, 8
Bellis v. United States, 417 U.S. 85 (1974)	7
Berry, Matter of, 521 F.2d 179 (10th Cir. 1975), *stay denied*, 423 U.S. 810 (1975), *cert. denied*, 423 U.S. 928 (1975)	8
Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969)	5
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	4
Cook v. Houston Post Co., 616 F.2d 791 (5th Cir. 1980)	5
Crocker v. Hakes, 616 F.2d 237 (5th Cir. 1980)	5
Fisher v. United States, 425 U.S. 391 (1976)	8
Hanna v. Plummer, 380 U.S. 460 (1965)	6
Herschel v. Smith, 361 F.2d 355 (9th Cir. 1966)	5
Lefkowitz v. Turley, 414 U.S. 70 (1973)	7
Maness v. Meyers, 419 U.S. 449 (1975)	5
Martinez v. State of California, 444 U.S. 277, 100 S.Ct. 533, 61 L.Ed.2d 481 (1980)	4
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	7
Nevels v. Wilson, 402 F.2d 479 (5th Cir. 1968)	3
National Labor Relations Board v. Trans Ocean Export Packing, Inc., 473 F.2d 612 (9th Cir. 1973)	7
OKC Corp. v. Williams, 461 F.Supp. 540 (N.D. Tex. 1978)	5
Rader v. Baltimore & Ohio R. Co., 108 F.2d 980 (7th Cir. 1940), *cert denied*, 309 U.S. 682 (1941)	6

Page

Sacks v. Reynolds Securities, Inc., 593 F.2d 1234 (D.C. Cir. 1978) 3

Sarelas v. Porikos, 320 F.2d 827 (7th Cir. 1963) 5

Singler v. Lowrie, 404 F.2d 659 (8th Cir. 1968), *cert. denied*, 395 U.S. 940 (1969) 5

United States v. Mahady & Mahady, 512 F.2d 521 (3rd Cir. 1975) 8

West v. Solito, 563 S.W.2d 240 (Tex. 1978) 5

STATUTES AND RULES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1985 2

42 U.S.C. § 1986 2

Fed. R. Civ. Proc. 1 6

Fed. R. Civ. Proc. 12(b)(6) 2, 3, 8

Fed. R. Civ. Proc. 26(b) 6

Fed. R. Civ. Proc. 56 2

Fed. R. Evid. 101 5

Fed. R. Evid. 501 5

Tex. Code Crim. Proc. § 38.10 5

Tex. R. Civ. Proc. 2 6

Tex. R. Civ. Proc. 186a 6

TREATISES

5 Wright and Miller, *Federal Practice and Procedure* (1971) 2

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Bradt* v. *Smith*, 634 F.2d 796 (1981). The Order of the United States District Court for the Southern District of Texas is not reported.

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the procedural background and facts of this case. For clarity, reference to the parties in this Brief will be made by their surnames.

REASONS FOR DENYING THE WRIT

The questions presented in the petition for writ of certiorari are not of national significance and are not appropriate for review by this Court. Bradt seeks to have this Court apply the federal civil rights statutes to a pretrial discovery matter in a civil proceeding in a state court. The courts below applied well-settled principles of federal law when they denied the relief sought by Bradt in this case. Thus, there is no compelling reason why this Court should review the disposition of this case by the courts below.

1. BRADT IS NOT ENTITLED TO A TRIAL OR AN EVIDENTIARY HEARING ON A MOTION TO DISMISS WHICH IS FILED PURSUANT TO RULE 12(b)(6).

In his first argument in the petition, Bradt claims that the Court of Appeals erred when it affirmed the dismissal of his Amended Complaint without giving him an opportunity to present evidence in support of his allegations. (Petition at 7-9). As this Court is aware, Alexander and Butler Binion based their Motions to Dismiss on Rule 12(b)(6), Federal Rules of Civil Procedure, and claimed that Bradt failed to state a claim upon which relief could be granted. (R. 38, 86). It is clear from the Rule, and the authorities, that such a Motion is directed to the sufficiency of the claim for relief, not the evidence in support of the claim. 5 Wright and Miller, *Federal Practice and Procedure,* §§ 1356, 1366 (1971); *compare* Rule 12(b)(6) *with* Rule 56.

Alexander and Butler Binion recognize their burden under Rule 12(b)(6). However, their position in the courts below was that Bradt failed to state a cause of action against them under 42 U.S.C. §§ 1983, 1985 and 1986 even if the allegations contained in the Amended Complaint were taken as true. The question before the Court of Appeals was whether the Complaint itself stated a valid claim for

relief. If the Complaint was insufficient as a matter of law, the trial court correctly dismissed it. *Nevels* v. *Wilson*, 402 F.2d 479 (5th Cir. 1968); *Sacks* v. *Reynolds Securities, Inc.*, 593 F.2d 1234 (D.C. Cir. 1978).

In short, Bradt does not challenge the merits of the dismissal in his first argument in the petition. Rather, he claims that the method by which the trial court made its decision, that is, based on the Amended Complaint alone, was improper. This is precisely the procedure outlined in Rule 12(b)(6), and it was entirely proper for the trial court to make such a ruling. Since the allegations were taken as true, a trial or evidentiary hearing would have served no useful purpose. The trial court did not err when it followed the dictates of Rule 12(b)(6), and dismissed the case based on the pleading alone. Quite simply, Bradt was not entitled to present evidence to the Court under this particular Rule.

2. THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT IMMUNITY ARE NOT RIGHTS, PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES WHEN THEY ARISE IN THE CONTEXT OF A CIVIL PROCEEDING IN A STATE COURT.

In his second argument in the petition, Bradt claims that the Court of Appeals erred when it held that Respondents were immune from liability under 42 U.S.C. § 1983. (Petition at 9). Bradt has clearly misread the opinion of the Court of Appeals on this point. The Court did not hold that Respondents were immune under the statute since the Court never reached the issue. Rather, the Court found that there was no deprivation of a federal constitutional or statutory right, so there could be no liability under the statute. 634 F.2d at 799. Thus, the only issue before this Court is whether the petition for writ should be granted to review

the finding that Bradt was not deprived of a federal right in the state court proceeding. The section of the petition dealing with the immunity issue is not relevant to this case, since Bradt failed to meet the threshold requirement for liability under 42 U.S.C. § 1983.

It is clear that the first inquiry in any action brought under 42 U.S.C. § 1983 is whether the Plaintiff has been deprived of a right "secured by the Constitution and laws" of the United States. *Baker* v. *McCollan,* 443 U.S. 137 (1979). As an analytical matter, the federal court should isolate the specific claim involved in order to determine if it falls within the requirement of the statute. *Martinez* v. *State of* Cali*fornia,* 444 U.S. 277, 284 n.9 (1980). Section 1983 does not create any substantive federal rights, but merely provides a remedy for a deprivation of a right existing under another federal law. *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600 (1979). A brief review of the Amended Complaint, and the Petition, compels the conclusion that Bradt failed to meet this threshold requirement.

It is important to note that Bradt claims the deprivation of federal constitutional and statutory rights resulting from a discovery Order made by Judge Smith in the state court proceeding. Bradt argues that the Order on Defendants' Motion for Production of Documents violated his rights under the attorney-client privilege, work-product immunity, and the fifth amendment. These Respondents would show that the first two doctrines do not comprise federal rights, and that the third doctrine has no application to this case.

42 U.S.C. § 1983 is not concerned with violations of state law. A cause of action under the statute will lie only when such a violation results in a deprivation of a federal right.

Cook v. *Houston Post Co.*, 616 F.2d 791 (5th Cir. 1980); *Crocker* v. *Hakes*, 616 F.2d 237 (5th Cir. 1980); *Singler* v. *Lowrie*, 404 F.2d 659 (8th Cir. 1968), *cert. denied*, 395 U.S. 940 (1969). As a general matter, the federal courts have held that violations of state discovery rules are not cognizable under § 1983. *See, e.g., Sarelas* v. *Porikos*, 320 F.2d 827 (7th Cir. 1963) (an alleged abuse of the deposition procedure in the state court failed to state a claim under § 1983); *Brown* v. *Dunne*, 409 F.2d 341 (7th Cir. 1969) (denial of hearing by state court judge on motion to vacate previous order in probate matter did not present federal claim). Of course, a federal court cannot amend a state rule of civil procedure. *Herschel* v. *Smith*, 361 F.2d 355 (9th Cir. 1966). Although these cases provide general guidelines in this area, these Respondents will discuss each of Bradt's theories separately and briefly.

The attorney-client privilege is a rule of evidence, not a constitutional right. *Maness* v. *Meyers*, 419 U.S. 449, 466 n. 15 (1975); *OKC Corp* v. *Williams*, 461 F.Supp. 540, 546 (N.D. Tex. 1978); Fed R. Evid. 501. This is particularly true in a civil case in which there are no sixth amendment implications. As such, the privilege is a matter of state law in a state court proceeding. If Judge Smith ordered Bradt to produce documents in violation of the privilege, he did so under state law. *Beckler* v. *Superior Court of Los Angeles County*, 568 F.2d 661 (9th Cir. 1978); *compare* Fed. R. Evid. 101 and Fed R. Evid. 501 *with* Tex. Code Crim. Proc. § 38.10 and *West* v. *Solito*, 563 S.W.2d 240 (Tex. 1978). The attorney-client privilege arises under federal law only when it is applied in the federal court. Thus, as a rule of evidence, the federal doctrine was not relevant to the proceeding before Judge Smith. Even if the privilege was violated, it did not comprise a deprivation of a federal constitutional or statutory right, and cannot be the basis for a claim under § 1983.

The same rationale applies to the claim of work-product immunity. This doctrine is recognized and contained in both the federal and state rules of civil procedure. Fed.R. Civ.Proc. 26(b); Tex.R.Civ.Proc. 186a. No court has elevated this qualified immunity to a constitutional principle, and it is based solely on the rules of civil procedure. The Texas court is under no burden to apply the federal rule in its own proceedings. *Rader* v. *Baltimore & Ohio R. Co.*, 108 F.2d 980 (7th Cir. 1940), *cert. denied*, 309 U.S. 682 (1941); *compare* Fed.R.Civ.Proc. 1 *with* Tex.R. Civ.Proc. 2; *see also Hanna* v. *Plummer*, 380 U.S. 460 (1965). The state is free to set the limits of the immunity without interference from the federal court. In short, the work-product immunity cannot provide the federal right necessary under § 1983, since it is based on state law in the state court.

3. BRADT FAILED TO ALLEGE A DEPRIVATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

In his final argument in the petition, Bradt states that his privilege against self-incrimination was violated in the state court proceeding. He makes this claim without any reference to his pleadings or the law. Quite simply, the fifth amendment is not involved in this case. Bradt makes a general claim that Judge Smith and these Respondents violated his constitutional right against self-incrimination through the use of "coercive measures under the Texas Discovery Statutes." (R. 53). More specifically, Bradt complains that Judge Smith, on the Motion of these Respondents, ordered Bradt to produce the files of all clients who were former clients of Bible & Associates. (R. 50). There is no basis for application of the fifth amendment under these facts.

Since the state court action is a civil proceeding, Bradt may claim the privilege only if the contents of the documents might incriminate him in a future criminal suit. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). As the Court noted in *National Labor Relations Board* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612 (9th Cir. 1973):

> ... where [a fifth amendment] claim is made in a case other than a criminal prosecution of the person claiming the privilege, the claim may be rejected if, under the circumstances, the witness may not reasonably apprehend that the disclosures he is called upon to make could be used against him in a criminal prosecution or could lead to other evidence that might be so used.

Id. at 617, *citing Murphy* v. *Waterfront Commission*, 378 U.S. 52, 94 (1964) (White, J., concurring). There is no claim here that the content of the documents would subject Bradt to criminal prosecution. Rather, Bradt asserts that he may be liable for criminal contempt if he refuses to produce them. This possibility does not cloak the documents with fifth amendment protection.

Furthermore, there is no privilege for Bradt as the custodian of the records for his clients. A very similar situation to the case at bar was presented in *Bellis* v. *United States*, 417 U.S. 85 (1974). There, a federal grand jury issued a subpoena to a member of a dissolved law partnership, which demanded the partnership's financial books and records. The lawyer refused to produce the documents on fifth amendment grounds, and the District Court held him in contempt. The Court of Appeals affirmed. *In re Grand Jury Investigation*, 483 F.2d 961 (3rd Cir. 1973) (per curiam).

This Court issued a writ of certiorari, and affirmed the lower courts. The Court held that the partnership, although

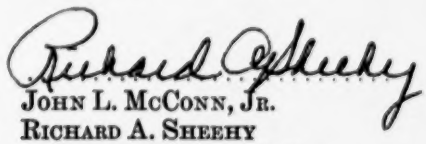
small, had an institutional identity, and that there was no fifth amendment protection for the custodian of the records. The Court emphasized that the privilege is personal, that is, it extends only to an individual's private papers and testimony. Thus, the Court found that the records of the firm were not privileged even if they incriminated the lawyer personally. *See also Matter of Berry,* 521 F.2d 179 (10th Cir. 1975), *stay denied,* 423 U.S. 810 (1975), *cert. denied,* 423 U.S. 928 (1975), *reh. denied,* 423 U.S. 1039 (1976); *United States* v. *Mahady & Mahady,* 512 F.2d 521 (3rd Cir. 1975). Of course, Bradt may not assert the privilege on behalf of his clients. *Fisher* v. *United States,* 425 U.S. 391 (1976). In short, since the content of the files would not subject Bradt to criminal prosecution, and they are in his possession in a representative capacity, there is no fifth amendment right involved here. *See Beckler* v. *Superior Court of Los Angeles County,* 568 F.2d 661 (9th Cir. 1978).

It is clear that the use of the state discovery rules in this case, even if improper, did not implicate any right "secured by the Constitution and laws" of the United States. The Order for production of documents issued by Judge Smith, in the state court, under the state rules of civil procedure, is a matter of state law. There is no federal right involved here. Thus, the Court of Appeals correctly affirmed the dismissal of Bradt's Complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. Proc. 12(b)(6); *Baker* v. *McCollan,* 443 U.S. 137 (1979).

CONCLUSION

It is clear from the authorities discussed herein that the Court of Appeals applied principles established by this Court when it affirmed the dismissal of Bradt's Amended Complaint for failure to state a claim upon which relief could be granted. Respondents Alexander and Butler Binion respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,



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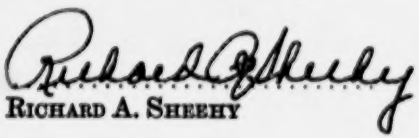
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was forwarded, regular mail, postage prepaid, to all counsel of record on this 18th day of June, 1981.



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